IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LOMAX TRANSPORTATION COMPANY, A Corporation,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

No. 12422

On Appeal from the District Court of the United States for the Eastern District of Washington

BRIEF FOR THE APPELLEE

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ADDITIONAL STATEMENT OF THE CASE

Inasmuch as the appellant's statement of the case is very brief, it may be helpful to the Court to have a short additional statement made as to the important facts. The contract, which is set out in its entirety in the statement (Tr. 8-28), provides for the warehousing by the appellant's warehouse company of certain Naval

stores. Three months after the merchandise was stored in the appellant's warehouse a fire occurred which caused considerable damage to the Naval stores in the warehouse. The fire was caused without any fault on the part of the appellant. The contract provided as follows:

> "Special Provisions: A. Contractor assumes absolute responsibility for property in his possession and shall maintain Bond and Insurance at his own expense in accordance with the State of Washington Warehousing Laws."

It was admitted during the trial that the State of Washington had no mandatory insurance provision in its warehousing laws. As different parcels or loads of merchandise were delivered by the Navy to appellant's warehouse, the appellant would issue its ordinary receipt to the Navy personnel who delivered the merchandise to the warehouse. The receipts were printed by the appellant and used for all merchandise that was received and receipted for. The receipt contained the following provisions:

> "The Company will be responsible for exercise of ordinary diligence and care, but not responsible for ordinary wear and tear in handling, nor for loss or damage to said goods caused by moth, fire, rust or deterioration, Acts of God, or other causes beyond its control." (Appellant's brief, page 5).

After the fire occurred in the warehouse, J. M. Lomax, the President of the appellant corporation, was notified that the Navy claimed certain losses due to the fire and made a demand upon the appellant requesting

that he pay the Navy the amount of loss that it suffered. The first demand letter was received by the appellant in February, 1945, more than two months after the fire (Tr. 85). The first demand was for $12,359.13. Later other demands were made culminating in a demand on December 13, 1946. for the sum of $16,415.87. The reason for the increase in the amount due was that certain of the salvaged cloth had to be shipped to New York and a sale made before the final loss became determined. Later, the claim was referred to the General Accounting Office and a demand made upon the appellant to pay the same (Tr. 91).

Soon after the occurrence of the fire a Naval Board of Inquiry was assembled and inquiry was made as to the nature of the fire. The appellant attended this Board of Inquiry and gave testimony (Tr. 91). Effort was made by the officers of the Navy to realize everything possible from the reclamation of the burned material. The appellant, upon demand, refused to make any payment and made no effort toward securing administrative relief from the Navy by asking for reformation of the contract and by appealing to the contracting officers or to the Secretary of the Navy and appellant took no steps under the Disputes Article of the contract, Article 17, which provides as follows:

> "Disputes— Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer, subject to written appeal by the Contractor within 30 days to the Secretary of the Navy or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the mean-

time the Contractor shall diligently proceed with performance." (Tr. 26, 27).

The complaint was filed in the case on November 14, 1947, nearly three years after the loss, and judgment in the case was entered on September 6, 1949, almost two years later. The appellant was served with a Request for Admission under Rule 36 on April 9, 1948, as to an itemized detailed statement of the amounts of material damaged and the appraised value of the total damage to the Navy (Tr. 38-40). On May 4, 1949, thirteen months later, the appellant in answer to the Request stated that the copy of the Certificate of Settlement was a true and correct copy of the Certificate of Settlement and the appellant could not truthfully admit or deny various items of damage and the total amount of the damages set forth in said portions of the Certificate of Settlement for the reason that Naval personnel were in exclusive charge of the salvage operations and would not permit the defendant or any of its agents to be present during said salvage operations, and therefore the defendant had no knowledge or belief as to the amount of said damages if any (Tr. 48, 49).

The appellant on March 31, 1949 was served with interrogatories purporting to ascertain if appellant up to that time had pursued any administrative relief provided by contract or relief seeking a revision, modification or reformation of the contract and asking for the name of any agents of the Naval Department who might have made statements of non-liability on behalf of the Government to the appellant (Tr. 42-44). On April 30, 1949 appellant answered the interrogatories

stating that it had sought no administrative relief and did not remember which Naval Officer promised them that the contract was not one for insurance (Tr. 47-48). The matter proceeded to trial. The Government introduced no testimony but merely offered in evidence the exhibits which had previously been certified in pre-trial conference and requested by admission. The exhibits offered were the contract between the Navy and the Lomax Transportation Company and the Certificate of Settlement from the General Accounting Office. (Tr. 71, 72). Exhibit 3, a certified copy of the settlement of the account with the General Accounting Office, was also received in evidence. The Government rested its case. Testimony was then advanced on behalf of the defendant to the effect that he was engaged in the warehouse business in the City of Spokane; that the contract bore his signature; that the fire did occur on December 26, 1944; that he had no insurance upon the Government property in his warehouse; that he did not think that he was required to have insurance on the property; that he thought he was only legally obligated to provide for insurance against his own negligence (Tr. 79-82).

Lomax further stated that he did not do the typing on the contract; that he did not read the contract before he signed it (Tr. 92).

The contract in question was signed on behalf of the United States by J. Ball, Capt. U.S.N., Supply Officer in Command, and J. M. Lomax, President of the appellant corporation, whose signature was witnessed by W. W. Witherspoon, Secretary of the corporation and a long time member of the bar of the State of Washington and a member of the bar of this Court.

ANSWER TO APPELLANT'S ASSIGNMENTS OF ERROR 1-3 INCL.

I.

The appellant discusses the following three assignments of error together and appellee will likewise discuss them together:

1. The District Court erred in denying defendant's motion to dismiss plaintiff's complaint, which order was signed and filed December 9, 1947.

2. The District Court erred in granting plaintiff's motion to strike in part paragraph III of defendant's amended answer, which order was signed and filed April 7, 1949.

3. The District Court erred in refusing to admit in evidence the findings of fact of the Naval Board of Inquiry to the effect that recovery from the contractor under his insurance would be limited to his legal liability under the existing Washington Warehouse Laws, and that there was no apparent negligence on the part of the defendant. (Plaintiff's Ex. 1, Tr. 96).

The appellant and the officers of the Government executed a contract of insurance. It is admitted that a common law bailee for hire, such as the appellant warehouse company in this case, would not have to exercise any more than ordinary care or at the most a high degree of care, being a compensated bailee, but in this case the parties made a special contract of bailment which provided that the Contractor assume absolute responsibility for property in his possession and shall maintain bond and insurance at his own expense in

accordance wth the State of Washington Warehousing Laws.

It is admitted that the State of Washington has no warehousing laws compelling a warehouseman to take out insurance of this kind on merchandise stored in his warehouse, but the State of Washington has no law prohibiting a warehouseman from contracting to assume absolute liability and provide the bond and insurance at his own expense, and that is what the appellant in this case contracted to do so that the District Court was correct in construing this to be a contract of insurance in addition to being a contract of warehousing because that is exactly what the contracting parties provided by their own instrument.

Whether or not this contract was dictated by one C. T. McCormack, Jr. or not is immaterial. The important consideration is that it was executed according to Naval regulations and signed by a proper contracting officer and officers of appellant. Even if McCormack were produced as a witness, his testimony would be inadmissible to alter, vary or explain away the provisions of a written contract which is itself definite and certain.

The appellant also makes an argument (Tr. 12) that bonded warehouse receipts were used by the appellant and upon those receipts language was contained which exempted the appellant for fire loss. It would not make any difference what language the appellant used upon its official receipts for merchandise because those receipts were not a contract with the Government, and the mere fact that some Naval officer or employee of

the Navy accepted a receipt with the kind of language contained therein would certainly not be binding or controlling upon the Government as the only way that the Government could be bound is by a contract properly executed and not by a unilateral agreement written on a receipt in fine language given to a Naval employee by the appellant in exchange for merchandise.

Appellant's argument that this contract entails hardship on itself should not be considered at this time and it is no concern of the Court whether or not the contract later proved to be improvident. Lomax, President of appellant corporation, was a warehouseman and owned three warehouses in the City of Spokane. He certified that he read the contract (Tr. 28). In addition his signature was witnessed by two witnesses, Helen Ferguson and B. C. Redhead, and attested to by the corporation Secretary, W. W. Witherspoon, a long time member of the bar of this Court. Certainly the courts cannot rewrite a contract on account of hardship because what was apparently a good contract when made turned out to be a disadvantageous contract due to unforeseen circumstances.

The appellant also argues that the contract was drawn by the Government and should therefore be construed most strongly against the party drawing it. Certainly the Government agent C. T. McCormack, who, as appellant now contends, drew the contract, had no more business or legal experience than the agents of the appellant whose names appear upon the contract.

No cases are cited, nor is it believed that any cases can be cited, showing that contracts involving the United States should be construed against the United States

because they were drawn or dictated by an officer of the United States. Certainly there is not even anything ambiguous about the provision of paragraph 4 A.

The contractual provision is one of insurance. The appellant next contends that the existing Naval regulation at the time found in the Bureau of Supplies and Accounts Manual provides as follows:

> "The Navy Department has adopted the general policy of self-insurance under which it assumes the risk of loss or damage to government owned property in the hands of contractors. Pursuant to this policy, uniform insurance provisions have been inserted in the government furnished material clause and the advance and partial payment clauses. Field purchasing officers will not include any other insurance provisions in contracts without the approval of the Bureau of Supplies and Accounts and the Assistant Secretary of the Navy, Material Division (Procurement Branch, Insurance Section)."

The quoted regulation is part of a regulation having to do with construction contracts and deals with building construction contractors. No particular regulation has been discovered having to do with the storage and warehousing of Naval property. The regulation provides, insofar as construction contracts are concerned, the Navy Department has adopted a general policy of self-insurance under which it assumes the risk on Government-owned property. Even if this proviso applied to storage contracts the Government could still take full advantage of the contract provisions although the Naval officer, in executing the contract, has gone beyond his authority and driven a deal for the Government which is more advantageous to it and which is

more burdensome upon the contractor than the regulation would require.

The case illustrative of this is *Gilbert & Secor v. United States,* 75 U. S. 358. In this case the contracting officer required the use of copper sheathing which went beyond the authority of the Act of Congress which authorized felt sheathing. The contractors then proceeded to bring suit in the Court of Claims. The Court held that Congress intended to authorize the Secretary of the Navy to make the best contract he could, not exceeding the limit. It also appeared from the agreement signed, and therefore accepted by the claimants, that the Secretary was induced to exercise the option which the Act gave in regard to the two kinds of work, in favor of that of claimants, in consideration that they would copper-fasten the dock without additional charge, although the regulations merely provided for the use of felt. The contractors, having thus induced the Secretary to decide in their favor, by awarding them the contract, are not at liberty to repudiate that part of the contract in regard to price. The Court held that there was no reason to infer any contract prior to the written agreement governing the rights of the parties.

The case of *The International Contracting Company v. Lamont,* 155 U.S. 303, was an action by mandamus to set aside the written contract to do excavation work for 13.7 cents per cubic yard and have a contract signed with the Secretary of War to do the work for 19.7 cents per cubic yard. The Court held that the second contract was entered into by the contractor's own accord and he has taken advantages which resulted from his action under it and has received the compensation which was

to have been paid under its terms. In having done all this the contractor is estopped from denying the validity of the contract. The Court further held that the fact that in the second contract the contractor protested that he had rights under the first did not better his position. If he had rights he should have abstained from putting himself in a position where he voluntarily took advantage of the second opportunity to secure the work.

The Court further held that a party cannot avoid the legal consequences of his acts by protesting at the time he does them that he does not intend to subject himself to such consequences and that, if the claimants had any objection to the provisions of the contract they signed, they should have refused to make it and, having made it and executed it, their mouths are closed against any denial; that it superseded all previous arrangements. To this effect are two other cases, *Steele v. United States,* 113 U.S. 128 and *District of Columbia v. Barnes,* 197 U.S. 146. The officers of the United States Navy were bound to obtain the best contract that they could. Appellant may not have gotten the contract if it did not agree to the insertion of this insurance clause, paragraph 4 A. The appellant had a perfect right to refuse to execute this contract with this clause in it, which it says is now so obnoxious. Certainly this provision was written into the contract by both parties as the result of open bargaining and there was no prohibition against such a provision in the contract.

Counsel for appellant further makes the statement that the conduct and declaration of the parties may always be evidence of the subsequent modification of

their contract (Br. 17). The appellant has not set forth any modification other than the fact that certain receipts were issued bearing the printed provisions that the warehouseman would not be liable for fire. If he intended to proceed upon that theory that the contract should be modified or rewritten, the appellant had ample opportunity to proceed to secure a modification or revision which will be later referred to.

ANSWER TO APPELLANT'S ASSIGNMENTS OF ERROR 4-7, INCL.

II.

The appellant then makes the following assignments of error and discusses them together — we shall discuss them collectively:

> 4. The District Court erred in admitting and considering in evidence over defendant's objection the Certificate of Settlement of the General Accounting Office (Plaintiff's Ex. 3) for the purpose of providing that the Government sustained damages and the amount thereof. (Tr. 73-76)
>
> 5. The District Court erred in denying defendant's motion for a non-suit and for a dismissal of the complaint on the ground of a total failure of proof as to any damages sustained by plaintiff. (Tr. 76)
>
> 6. The District Court erred in rendering and entering the final judgment in the sum of $16,415.87. (Tr. 52, 53)
>
> 7. The District Court erred in denying defendant's alternative motion for judgment notwithstanding the decision and for a new trial. (Tr. 55, 56)

At the trial there was introduced in evidence as Exhibits 2 and 3 the Certificate of the General Accounting Office which was a certified copy of the appellant's accounts on the books of the General Accounting Office. The appellant did not object to the Certificate on the grounds of authenticity, but objected solely upon the ground that it was incompetent to prove the amount of damages suffered as a result of the fire (Tr. 74). It

should be considered by the Court at this time that although demand was first made upon the appellant on February 2, 1945, no administrative relief was sought by the appellant down to the time of the entry of judgment in September, 1949, more than four and one-half years later. Article 17 of the contract provides as follows (Tr. 26, 27):

> "Disputes— Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer, subject to written appeal by the Contractor within 30 days to the Secretary of the Navy or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime the Contractor shall diligently proceed with performance."

In addition to the disputes article in the contract, relief from mistake in Naval contracts is provided by the following other methods:

1. Naval Regulation 1071 provides that contracts may be amended or modified by contracting officers (Tr. 104-106), also the following naval regulations: Title 34, C.F.R., 1947 Supp., Sec. 1.11, paragraph B(1) and F(1). (These regulations create the Bureau of Supplies and Accounts by the Secretary of the Navy). "Services" are defined as including warehousing, Title 34, C.F.R., 1947 Supp., Sec. 31.121-11. Mistakes in bids can be corrected by the contracting officer, Title 34. C.F.R., 1947 Supp., Sec. 31.244. Disputes are dealt with in Title 34, C.F.R., 1947 Supp., Sec. 31.324 to 31.328, and these regulations provide that they should be determined by contracting officers. Title 34, C.F.R. 1947

Supp., Sec. 32.2 and 32.3 provides that the Navy should dispose of surplus property at the best prices obtainable.

2. Title 5, U.S.C.A. Supp., Sec. 1009c, the Administrative Procedure Act, provides that administrative remedies must be pursued to a finality before the courts will take cognizance of the dispute.

3. Title 41, U.S.C.A. Supp., Sec. 113 and 117 gives the contractor certain administrative remedies as to a war contract if the contract is defective or deficient, as claimed, and the contractor has the right to appeal to the Appeal Board, which decision shall be final.

The appellant, although it had several years to do so, made no resort of any nature either under Article 17, the Disputes article of the contract, under the Administrative Procedure Act, under the Naval Regulations, or under the statutes dealing with defective contracts, by appealing to the contracting officer, and through administrative channels for a redress of grievances. During all times that the case was pending the appellant did absolutely nothing except hold some oral conversations with some Naval personnel, the names of which he does not now remember, as to what his rights and obligations were under the contract. The Disputes provision of the contract and the Naval regulations gave the appellant ample protection, if he would have availed himself of the opportunity. Instead of doing this he did absolutely nothing except wait and see what would happen. The appellant admits that he was at the Board of Inquiry hearing when the matter of the

amount of loss was being determined. The time for the appellant to have been heard upon the dispute as to the value of the salvage and the loss occasioned by the fire was the hearing before the Naval Board of Inquiry held at the time of the fire or even after receiving the award. If the appellant was dissatisfied, he had the right and privilege of appealing to the contracting officer as provided by the regulations and, if dissatisfied with the contracting officer's decision, he had the right to appeal to the Secretary of the Navy ultimately to determine this question.

The appellant assigns as error the admission of the General Accounting Office "Certificate of Settlement" under date of November 12, 1946, which stated in part that the appellant Warehouse Company was indebted to the United States in the sum of $16,415.87 and that no individual, agent or employee of the General Accounting Office was produced to testify as to the correctness of such statement and that no one having to do with the salvage of the Naval stores and the preparation of the certificate was called, nor were books or records of the Navy Department submitted in evidence. Immediately after the fire there was a Naval Board of Inquiry hearing at the warehouse, at which, among those present at the Board, was J. M. Lomax, President of the appellant corporation.

Title 28, Section 1732, U.S.C.A., is a statement of the Shop Book Rule of Evidence, by which statute any written record made as a memorandum of record of any account or transaction shall be admissible as evidence of such act or transaction if made in the regular

course of business. The statute further provides that all other attendant circumstances, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility. Title 28, Section 1733, U.S.C.A., provides as follows:

> "(a) Books or records of accounts or minutes of proceedings of any department or agency of the United States shall be admissable to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.
>
> "(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof."

The records in the office of the General Accounting Office were certainly made in the regular course of business having to do with an account of the United States against a contractor for warehousing Government material and supplies. The appellant had every means and opportunity of arguing to the Court and showing to the Court the lack of personal knowledge of the entrant or maker, if he so desired, and had ample means at his disposal during the several years that this case was pending trial of taking depositions availing himself of the discovery procedure to arrive at the correctness of this memorandum. Certainly the copy received in evidence was a properly authenticated copy of the record and as such would be admissible as a copy of the record of a department or agency of the United States, so that both these statutes together,

Sections 1732 and 1733 of Title 28 U.S.C.A., made this document admissible in evidence.

The Supreme Court of the United States has passed on the admissibility of evidence of this type in a number of cases. In the case of *United States v. Gaussen,* 86 U.S. 198, the Court states at the bottom of page 212:

> "While a garbled statement is not evidence, or a mutilated statement, wherein the debits shall be presented and the credits suppressed, or perhaps a statement of results only, it still seems to be clear that it is not necessary that every account with an individual, and all of every account, shall be transcribed as a condition of the admissibility of any one account. The statement presented should be complete in itself, perfect for what it purports to represent, and give both sides of the account as the same stands upon the books."

In the case of *Soule v. United States,* 100 U.S. 8, another case interpreting the same statute, the Court stated as follows (page 11):

> "Treasury settlements of the kind are only prima facie evidence of the correctness of the balance certified; but it is as competent for the accounting officers to correct mistakes and to restate the balance as it is for a judge to change his decree during the term in which it was entered. Errors of computation against the United States are no more vested rights in favor of sureties than in favor of the principal. All such mistakes in cases like the present may be corrected by a restatement of the account."

The case of *United States v. Bell,* 111 U.S. 477. was a suit upon the bond of a purser of the Navy and at

the trial a transcript from the books and proceedings of the Treasury Department, duly authenticated, was offered in evidence.

In the case of *Moses v. United States,* 166 U.S. 571, the defendants, in an action for a balance due the War Department, took exception to the decision of the trial court in permitting the plaintiff to introduce certain transcripts of the books and proceedings of the Treasury Department for the purpose of proving the actual state of the accounts between the government and one Howgate. The transcripts were objected to on two grounds: (1) that they showed on their face that they were mere statements of balances and not the entire account between the parties; (2) that they showed that the government officers had made a restatement of Howgate's account after he ceased to be property and disbursing officer, and that there was no authority for making such restatement, and that it was not evidence against the defendants. The certified statement in the case stated that there was a balance due the United States of $133.255.22 and the certificate did not purport to certify to a copy of the whole account between the government and Howgate. The Court held that all the records in the case were admissible and constituted a full statement of the amounts and balances due.

The case of *United States v. Pierson,* 145 Fed. 814, was an action brought on the bond of a United States Indian Agent in which a transcript of the books and proceedings of the Treasury Department, duly certified and authenticated as required, were offered in evidence. The Court stated at page 817:

"The transcript itself was sufficient proof, in the absence of countervailing evidence, to entitle the government to a verdict upon many of the items in controversy.

"The effect of transcripts from the books and proceedings of the Treasury Department, certified in accordance with the act of Congress, as evidence in actions against officers accountable for public moneys and their sureties has been recognized many times. Such a transcript is not, as counsel for the defendants seems to contend, proof of such a low order that it may be disregarded by the court. A transcript, when in proper form, properly certified, and admitted in evidence, makes a prima facie case for the government, and. although the statute says 'that the court trying the cause shall be authorized to grant judgment and award execution accordingly,' it is not meant that whether the court shall do so or not is left in any degree to its discretion. If the prima facie case made by the transcript is not overthrown, it is error to refuse to grant judgment. The case is then like any other in which a plaintiff has made a prima facie showing."

Of like effect is the case of the *United States v. DuPerow*, 208 Fed. 895.

In the case of *Vanadium Corporation v. Fidelity and Deposit Company*, 159 F. (2d) 105, cited by the appellant, the Court admitted certain documents produced from the files of the Interior Department, which plaintiff contended were hearsay evidence and should not be admissible. The Appellate Court held that the Trial Court properly admitted the documents as official entries and documents and were within the exception of the hearsay rule.

The case of *Mohawk Condensed Milk Co. v. United States,* 48 F. (2d) 682, cited by appellant, was a suit for overpayment of income and profits taxes and a setoff was attempted to be made for certain amounts of canned milk sold to the government and charged for at excess prices. In this case there was merely an examination of plaintiff's books by a representative of the Federal Trade Commission and a certification thereof made. In this particular case there was a full Naval Board of Inquiry hearing at which the appellant was present.

Also in the case of *Rugo Construction Co., Inc. v. New England Foundation Co.*, 172 F. (2d) 964, cited by appellants, the Navy Department's final settlement in the sum of $25,000.00 was excluded and it was pointed out that there was no evidence as to who made the appraisal or on which basis it was made, and it was merely an appraisement value of a certain amount upon the boat, which was a matter of opinion. The Court stated that it was without probative value, since there is nothing to indicate that it was made without motive to inflate, by a competent expert, after the appraisal.

In the *Rugo* case and the *Mohawk* case the appraiser could have been called as a witness and subjected to cross examination, which could not be done with a Naval Board of Inquiry.

The case of *United States v. Smith*, 35 Fed. 490, cited by appellant, was a case on a bond given by the defendant to secure his faithful performance as Indian Agent. In that case the Court held that, as to public moneys, a transcript from the Treasury Department was admissible against the appellant as evidence of the amount of the shortage, but a transcript from a book which

merely shows a shortage in gross for the value of public property, without describing the property or the method of valuation or the manner in which it came to his hands or the disposition made, is of no value as to that cause of action.

The situation in this case is entirely different because of the request for admissions under Rule 36 served upon the defendant, itemizing the items of damage and the total damages to the Navy by items and the answer to the request for admission thirteen months later (Tr. 48, 49) in which the appellant states that he cannot truthfully admit or deny the various items of damage, since the naval personnel were in exclusive charge of all salvage operations and did not permit defendant or any of its agents to be present during such salvage operations. This answer is in conflict with the defendant's own testimony that he did attend the Naval Board of Inquiry meeting after the fire and gave testimony (Tr. 91).

It should be remembered in this case that after the occurrence of a fire the salvage operations must be pursued by the Navy before the amount of loss could be ascertained. Those operations would necessitate some length of time, in that the partially damaged material would have to be reprocessed, packaged, and shipped in many cases before it could be sold. No witness was available to the Government who had independent knowledge and recollection of these proceedings occurring during time of hostilities when the case was tried more than four and one-half years after the occurrence of the fire. The Naval Regulations, Title 34 C.F.R., 1947 Supp., Sec. 27.19, Page 5436, creating

the War Contracts Relief Board, give the contractor ample opportunity in an informal way to state his position in any controversy that may arise and secure an adjudication of his claims. Certainly the appellant was afforded due process of law by the statutes and regulations pertaining to this controversy, if he decided to use them.

CONCLUSION

The rights of the appellant were amply protected, because within two months after the occurrence of the fire in December 1944, according to his own statement he admits that he knew the Navy was making a claim against him. Although he says that he did not read the contract at the time he signed it, he knew two months after the occurrence of the fire that the Navy was claiming he owed money on account of the fire damage. The amount of the fire damage, if any, was certainly a dispute under Article 17 of the contract entitling the appellant to seek redress by the contracting officer, and, if dissatisfied, to the Secretary of the Navy or his duly authorized representative. As has been pointed out, the Administrative Procedures Act, Title 5, Section 1009, U.S.C.A., the Public Contracts Act, Title 41, U.S.C.A., Sections 113 and 117, and the Naval regulations in force and effect at the time also provided that the administrative remedy be pursued by the appellant.

The ~~Supreme Court of the United States in~~ Case of *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234, was a similar case in which a contractor failed to exhaust the administrative remedy. The contract contained the

same provision as the contract contained in this case. In that case the court said that failure to pursue the administrative remedy was fatal and the contractor could not proceed in the Court of Claims.

Also the case of *United States v. Blair et al*, 321 U.S. 730, was a similar case involving failure on the part of the contractor to pursue the administrative remedy. The Court in that case said (p. 736):

> "If the conduct of the government superintendents or contracting officers, or their assistants, was so unflagrantly unreasonable or so grossly erroneous as to imply bad faith, the appeal provisions of the contract must be exhausted before relief is sought in the courts."

The judgment of the Court of Claims was therefore reversed.

Also to the same effect is *Gerhardt F. Meyne Company v. United States*, 76 Fed. Supp. 811. Also the case of *United States v. Kelly*, 69 Fed. Supp., 89, at p. 93.

In this case, the government at an early date—February, 1945—disclosed its position, but the appellant did nothing with regard to the proceedings undertaken by the government, both during the stages that this claim was in its administrative phases and during the later action in Court. Since the defendant's own contract and the above-cited regulations provided that if he considered there was a factual dispute he should have addressed himself to the proper office of the Navy to determine that dispute and he failed to do so, he cannot now ask the Court to grant him relief for failure to take

steps which he contracted to take and which the regulations provided that he take.

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FRANK R. FREEMAN
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